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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/641,410	08/18/2000	Alice Mary O'Donnell-Kiely		7256

7590 01/28/2010
Alice O Kiely
71 Stonewall Court
Yorktown Heights, NY 10598-1819

EXAMINER

CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1794

MAIL DATE	DELIVERY MODE
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01/28/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	Application No. 09/641,410	Applicant(s) O'DONNELL-KIELY, ALICE MARY	
	Examiner JYOTI CHAWLA	Art Unit 1794	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 November 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☒ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 383-402.
 Claim(s) withdrawn from consideration: 403-417.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☒ Other: See Continuation Sheet.

/KEITH HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794

/JC/

Continuation of 3. NOTE: The applicant is advised to read MPEP 714.12 and 714.13. In particular "Once a final rejection that is not premature has been entered in an application, applicant or patent owner no longer has any right to unrestricted further prosecution. This does not mean that no further amendment or argument will be considered. Any amendment that will place the application either in condition for allowance or in better form for appeal may be entered. Also, amendments complying with objections or requirements as to form are to be permitted after final action in accordance with 37 CFR 1.116(b). Ordinarily, amendments filed after the final action are not entered unless approved by the examiner" Applicant is also advised to read 706.07, which concerns Final Office Actions, and discourages Applicants from switching from subject matter to subject matter, as done by Applicant from the Original Claims to the Amended Claims.

Applicant has amended the claims 383-399, 401-403, 405-408, 410, 412-414, 416, cancelled claims 400 and added one new claims 417. Claims 383-416 which were pending in the final office action dated July 9, 2009 have been amended. Amendment to claims 383-416 and addition of a new claim filed November 23, 2009 have not been entered as it raises new issues of search and consideration and also regarding new matter and indefiniteness.

Following are some of the examples of issues raised by the amendment:

1) For example, independent claims 383 and 403, have been amended from : "A non frozen support for a frozen comestible comprising an edible confocatory material comprising two ingredient materials within said edible confectionery material or two constituent ingredient materials" to "A suport for a frozen comestible comprising an edible material, said edible material comprises two materials". The new amendment changes the scope of the invention as the support materials need not be confectionary materials , as examined in the final office action dated July 9, 2009. Further, ingredient materials as examined in the final office action of 7/9/2009 are not the same as confectionery material comprising two materials.

2) For example, dependent claim 389 has been amended from "support comprises single component" to include two materials chosen from a list " two materials comprise two mixed materials, two layered materials, two twisted materials, two swirled maerials, two materials placed together, two attaqhed materiels, two materials placed concentrically, parallell or diagonally, two materials placed in a combination of directions...one of said two materials filled with the other of said two maerials, .one of said two materials wrapped with the other of said two materials, or a combination thereof." which changes the scope of the invention as claimed.

There are several other similar issues in the newly amended claims that would require further search and/or consideration.

Continuation of 11. does NOT place the application in condition for allowance because:

Applicants' argument that examiners' withdrawal of method claims 403-416 for being directed to an invention other than elected invention is incorrect as method claims were not present at the time of the election and the election was made between the species of products (Remarks, pages 17-19) is not persuasive. Claims directed to product. Currently amended and newly submitted claims 405 -417 are directed to a method of making a support, i.e., an invention that is independent or distinct from the invention elected in response filed January 18, 2003 to the original restriction requirement.

Since the applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation on the merits. Accordingly amended claims 405-416 and new claims 417-418 withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Applicant's other remarks submitted 11/23/09 are in regards to the newly added amendments, which have not been entered. Thus, the arguments are moot and the rejections are maintained for reasons of record.

Continuation of 13. Other: The amendment to specification filed 11/23/09 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the addition of "a composite material" in paragraphs [0043], [0044], [0164], [0166] which was not disclosed in the specification as originally filed and has also been added to claims. The term "a composite material" as disclosed in the amendment would introduce new matter and change the description from "a candy bar " to "a composite material candy bar" in paragraph [0164], which is not the same as a generic term "candy bar" as originally described. Therefore, the amendments to the specification introduce new matter and the applicant is required to cancel the new matter in the reply to this Office action.

Amendment to paragraph [0171] in reference to item100 in figure (27 E), it is noted that there is no item 100 labeled in Figure 27 E. Amendment to paragraph [0197] correcting the typographical error will be entered if submitted separately as has been indicated in the final rejection dated July 9, 2009.